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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY R. WALKER,

Defendant and Appellant.

A112860

(San Francisco County
Super. Ct. Nos. 2161912 & 194974)

Anthony R. Walker (defendant) entered a negotiated plea of guilty to a violation of Penal Code section 245, subdivision (a)(1). In accordance with the terms of the plea, the court sentenced him to two years in prison, and ordered defendant to pay a \$200 parole fine, and restitution of \$200 to the victim indemnity fund. The court retained jurisdiction for the purposes of determining the amount of victim restitution. After a hearing, the court ordered defendant to pay \$755.54 as reimbursement for assistance the victim received from the state restitution fund for \$60 in medical bills and \$695.54 in lost wages.

On appeal, defendant contends that he had inadequate notice of the amount of restitution sought for the victim's wage loss, that he was deprived of a fair opportunity to demonstrate the victim's employment terminated for reasons unrelated to the criminal assault, and that amounts paid to the victim by the restitution fund for wage loss were not adequately documented.

We shall hold that defendant had adequate notice and opportunity to challenge the restitution amount, and the court did not abuse its discretion in determining the amount of restitution for lost wages was \$695.54.

FACTS

The November 10, 2005 probation report stated that the restitution fund had paid the victim \$765.54 for lost wages.¹ The victim reported that his medical bills had been paid by his employer, but he believed his family should receive \$20,000 for emotional distress. In a supplemental report dated December 27, 2005, the victim's mother stated that the family would not seek additional restitution. The report concluded that the total amount of restitution owed therefore was \$765.54.

The restitution hearing was held on January 31, 2006. The California Victim Compensation and Government Claims Board (Victim Compensation Board) filed a certification of records itemizing payments the restitution fund made to the victim for medical bills in the amount of \$60, and for wage loss between August 29, 2003 (the day after the assault), to November 9, 2003, in the amount of \$695.54, for a total of \$755.54. The custodian of records declared under penalty of perjury that she prepared the "attached compilation of bills submitted to and paid by the Board" on the victim's behalf. The wage loss claim was supported by a document showing a calculation of the victim's total gross wage loss at the rate of \$424.40 per week as \$4,426.49, and a net loss of \$695.54 after deductions for taxes, and sick leave and state disability reimbursements. The declaration of the custodian of records further stated that this amount was calculated pursuant to Government Code section 13957, subdivision (a)(4), and that the state disability insurance and sick leave benefits had been verified.

Defense counsel did not dispute the amount paid for the victim's medical expenses, but did contest the amount paid for the wage loss. He informed the court that during trial preparation he had subpoenaed the victim's personnel records, and that these records would show that the victim's employment had been terminated because "he had

¹ The probation officer overstated the total amount by \$10, and failed to specify that \$60 of this amount was for medical expenses.

been on a drug run,” meaning he was absent from work during a period of drug abuse.² Counsel argued the victim therefore had no valid claim for wage loss, presumably on the theory that the victim’s wage loss was not caused by the defendant’s criminal conduct. The court noted that the personnel documents defense counsel described were not in the record before it. It declined to continue the hearing to give defendant an opportunity to submit the personnel records, noting that defendant was on notice of the amount of restitution sought for wage loss since the December 29, 2005 probation report, and the matter had been continued once already. The court further stated that the personnel records were “irrelevant” because the Victim Compensation Board “paid this amount out. If the victim committed fraud in getting that money, that is not going to persuade the Court that [the Victim Compensation Board] should not be reimbursed. You may have other remedies, but this is a restitution issue.”

Defense counsel also challenged the sufficiency of the documentation to support the amount of the wage loss, but did not offer any evidence to refute it. Instead, he argued that the documents attached to the declaration were not bills and did not “show . . . how they got to any of these numbers.” He also objected that there was no statement of the victim, under penalty of perjury, that the amount paid was the amount of his actual wage loss.

The court ruled that the documentation was sufficient and ordered restitution in the total amount of \$755.54 for medical bills and lost wages.

ANALYSIS

“A trial court’s determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. [Citation.] No abuse of discretion is shown simply because the order does not reflect the exact amount of the loss, nor must the order reflect the amount of damages recoverable in a civil action. [Citation.] In determining the amount of restitution, all that is required is that the trial court “use a rational method that could reasonably be said to make the victim whole, and may not

² Defense counsel did not specify whether these records would show the victim’s employment was terminated before or after the assault.

make an order which is arbitrary or capricious. [Citations.] The order must be affirmed if there is a factual and rational basis for the amount.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

With respect to the adequacy of notice, the question is whether defendant “received sufficient notice in advance of the hearing to investigate and oppose the probation officer’s recommendation.” (*In re S.S.* (1995) 37 Cal.App.4th 543, 548). Defendant argues notice was inadequate because he did not receive the certification of records showing the calculation of the wage claim until the day of the hearing. He did, however, have ample notice of the *amount*, and that it was for *lost wages*. The November 10, 2005 probation report specifically stated that the victim compensation fund had paid the victim “\$765.54 *for lost wages* [italics added].” The December supplemental report confirmed this amount. The restitution hearing was not held until January 31, 2006. If defendant suspected, as he asserted at the hearing, that the victim had been fired before the assault, or for reasons unrelated to it, he had two months in which to investigate and gather evidence to support his theory. (*Id.* at p. 547 [defendant’s due process rights are protected when he is given notice of the amount in the probation report, and an opportunity to challenge it by requesting a hearing]; see also *People v. Harvest* (2000) 84 Cal.App.4th 641, 653 [probation officer’s report may satisfy notice requirements for due process].)

The court also did not abuse its discretion by denying the continuance counsel requested on the day of the hearing. He sought the continuance so that he could offer the personnel records in support of his theory that the victim’s employment had been terminated for reasons unrelated to defendant’s criminal assault upon him. Yet, defense counsel could not have been surprised by the declaration of the custodian of records of the Victim Compensation Board filed on the day of the hearing because he already had ample notice of the amount of restitution sought and that it was for lost wages. Counsel stated he had subpoenaed the victim’s personnel records in preparing for trial, and made representations to the court as to what these records showed, yet offered no explanation for why he was not yet prepared to submit them to the court. Nor was he prepared to

present any other witnesses, such as the victim's employer, who might have been able to attest that the victim was fired before the assault. He also did not explain why he had not sought a continuance before the hearing date. Under these circumstances, the court was within its discretion to deny the request for a continuance. (See, e.g., *People v. Jones* (1998) 17 Cal. 4th 279, 318 [court did not abuse its discretion in denying a request for continuance when request was not made until the day before the hearing].)

The court also did not abuse its discretion by ordering restitution for the wage loss in the amount of \$695.54. "When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562.) The probation report clearly stated the amount sought, and defendant bore the burden at the hearing of coming forward with contrary information. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.) This he failed to do. In accordance with Penal Code section 1202.4, subdivision (f)(4)(B), the prosecution submitted a declaration signed under penalty of perjury by the custodian of records of the Victim Compensation Board itemizing the amounts paid to the victim. Although defense counsel argued that the attached documentation was not a bill reflecting payment to the victim for the wages, the custodian of records declared under penalty of perjury that the attached documents were bills reflecting the payments to the victim. She declared that she prepared the "attached compilation of bills submitted to and paid by the Board" on the victim's behalf. Penal Code section 1202.4, subdivision (f)(4)(A), provides that the amount of assistance paid by the restitution fund "shall be presumed to be a direct result of the defendant's criminal conduct." Defense counsel presented no evidence to refute that the restitution fund had paid the victim assistance in the amount stated in the custodian of records declaration, or that the amount paid was not the direct result of his criminal conduct. "Given defendant's failure to offer any evidence to challenge any of the amounts presented, the trial court did not abuse its discretion in awarding those amounts." (*People v. Keichler*, at p. 1048.)

CONCLUSION

The judgment is affirmed.

STEIN, Acting P. J.

We concur:

SWAGER, J.

MARGULIES, J.